



UNITED STATES SENATE
**REPUBLICAN
POLICY COMMITTEE**

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Homeland Security and Presidential Power

What the Nelson Amendment Does

There seems to be some confusion about the meaning and effect of the Nelson-Chafee-Breaux Amendment No. 4740 – and some of that confusion comes from the sponsors themselves. On the Senate floor yesterday, the sponsors said that the amendment doesn't really change current law, or at least not much. That claim cannot be correct.

Amendment No. 4740 will substantially diminish a President's statutory powers to protect national security – and these are powers that have been exercised by every President, Republican and Democrat alike, since 1978. The current President is trying to protect the national-security powers that were held by his predecessors, and he is trying to protect the national-security powers that will fall to his successors – unless they are snatched away by Congress. That this President is forced to defend those powers on a bill creating a Department of Homeland Security – which is being debated more than a year after the horrors of September 11, 2001 – is not just ironic but surreal.

Current Law

“The President may issue an order excluding any agency or subdivision thereof from coverage under this chapter if the President determines that – (A) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and (B) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.” 5 U.S.C. §7103(b)(1).

Nelson-Chafee-Breaux Amendment

“No agency or subdivision of an agency which is transferred to the Department pursuant to this Act shall be excluded from the coverage of chapter 71 of title 5, United States Code, as a result of any order issued under section 7103(b)(1) of such title 5 after June 18, 2002, unless – (A) the mission and responsibilities of the agency (or subdivision) materially change; and (B) a majority of the employees within such agency (or subdivision) have as their primary duty intelligence, counterintelligence, or investigative work directly related to terrorism investigation.” 107th Cong, 2d Sess., S. Amdt. No. 4740, section 731(a)(1) (titled “Limitation on Exclusionary Authority - In General”).

Under current law, a President may exclude an agency or office from the requirements of Title 71 of Chapter 5, United States Code, if he issues an order reciting the two requirements stated in 5 U.S.C. §7103(b)(1). The President may act unilaterally. It is often said that his determination is not reviewable in the courts, but that is not correct. In the leading case, *AFGE v. Reagan*, 870 F.2d 723, 727 (1989), the U.S. Court of Appeals for the District of Columbia held that a President's action was entitled to a “rebuttable presumption of regularity”; it did *not* hold that the courts had no jurisdiction. The Federal Labor Relations Authority has rightly been more deferential to Presidents, but as recently as this year the American Federation of Government Employees tried to get the Authority to review and reverse President Bush's executive order of

January 7, 2002. Whatever the jurisdictional nuances, however, current law gives Presidents authority that the pending amendment will deny.

Do not read section 7103(b)(1) too quickly. The most important part of the law *precedes* requirements “(A)” and “(B)”. The most important part is this: “The President may issue an order . . . *if the President determines. . .*” The order depends on a President’s determinations, not another’s.

Under the Nelson-Chafee-Breaux Amendment, a President will face many obstacles that are not found in current law. The amendment is *neither minor nor* technical:

1. To begin with, a President will have to follow the requirements of current law. The Nelson-Chafee-Breaux Amendment does *not* repeal and replace current law, but *adds* more requirements. It is logically impossible to multiply the demands on the President (some of which are explained below) and not increase his burdens.

2. *After* a President has issued an order under section 7103(b)(1), the Nelson-Chafee-Breaux Amendment’s new requirements will kick in. Under the express terms of that Amendment, a President’s order *cannot* exclude an agency or subdivision unless *additional determinations are made*. Unlike current law, those additional determinations are not vested expressly in the President of the United States. This Amendment is an invitation to administrative and judicial review of a presidential order.

3. The Amendment applies to any order issued after June 18, 2002. Why should this President and his successors be restricted to determinations made before that date? When President Clinton issued his order on March 11, 1997 to exclude the Naval Special Warfare Development Group, he was not bound by an arbitrary deadline that Congress placed on his predecessors.

4. If the Nelson-Chafee-Breaux language were enacted, a presidential order would *not* become effective “*unless*”, first, “the mission and responsibilities of the agency (or subdivision) materially change”. It is not enough for the mission to change, but both mission *and* responsibilities must change, and those changes must be “material”. To repeat an essential point, the Amendment does *not* say that the President is entitled to make such determinations unilaterally. To the contrary, a presidential determination will *not* be efficacious if these added requirements are not met.

5. If the Nelson-Chafee-Breaux language were enacted, a presidential order would *not* become effective “*unless*”, second, “a majority of the employees within such agency (or subdivision) have as their primary duty intelligence, counterintelligence, or investigative work directly related to terrorism investigation.” This is *not* a minor change: The “majority of employees” requirement, the “directly related” requirement, and the “terrorism investigation” requirement are all new. At the same time, the connection to “national security requirements and considerations” is dropped. Analyzing these changes would make for an interesting law school exam, but section 7103(b)(1) is intended to help a President protect the national security – and these new requirements will present significant obstacles to that goal.

One final point confirms the conclusions already drawn. Title XXXII of the Gramm-Miller Amendment No. 4738 provides, “Notwithstanding any other provision in this Act, nothing in this Act shall be construed to take away the statutory authority of the President to act in a manner consistent with national security requirements and considerations as existed on the day of the terrorist attacks on September 11, 2001.” The Nelson-Chafee-Breaux Amendment wipes out that language; section 731(d) of the Nelson Amendment declares that Title XXXII of the Gramm-Miller Amendment is “null and void”. That language should demolish any lingering doubt about the effects of the Nelson-Chafee-Breaux Amendment on presidential powers.

